

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY L. WILLIAMS)	
Claimant)	
VS.)	
)	
CENTRAL MECHANICAL CONST. CO., INC.)	Docket No. 183,553
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

On May 9, 1997, the application of claimant for review by the Workers Compensation Appeals Board of the Award entered by Administrative Law Judge Bryce D. Benedict dated December 30, 1996, came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, D. Steven Marsh of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Steven Hornbaker of Junction City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board. In addition, the Appeals Board considered the May 10, 1996, agreed Award filed in the Division of Workers Compensation, including all attachments. The Appeals Board further considered the stipulation of liability between the respondent and the Kansas Workers Compensation Fund dated November 18, 1996.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability? Is claimant entitled to a review and modification of the agreed Award of May 10, 1996?
- (2) Whether the deposition of Jerry Hardin taken October 22, 1996, should be considered as evidence in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant originally suffered accidental injury on June 3, 1993, while working as a pipefitter for Central Mechanical Construction Company. The parties entered into an agreed Award dated May 10, 1996. This Award entitled claimant to temporary total disability compensation at the maximum rate and a functional award of 27.5 percent permanent partial disability to the body as a whole.

On May 15, 1996, claimant filed an Application for Review and Modification and Attorney Fees requesting review of the May 10, 1996 agreed Award. Claimant alleged entitlement to a work disability in addition to his functional impairment. The matter went to regular hearing on September 19, 1996, at which time terminal dates were set. Claimant's terminal date was set for October 20, 1996. The deposition of Jerry Hardin which was to be taken on behalf of the claimant was scheduled for October 22, 1996, beyond claimant's terminal date. The deposition was taken at the time scheduled and a timely objection was entered by respondent alleging the deposition was taken outside the terminal date of the claimant. No request for an extension of terminal dates was ever filed by claimant in this matter. The Administrative Law Judge in his Award of December 30, 1996, found the deposition of Mr. Hardin to be outside claimant's terminal date and same was excluded from consideration. As a result, no evidence regarding claimant's ability to perform work in the open labor market was in the record. The work disability awarded by the Administrative Law Judge considered only claimant's loss of ability to earn comparable wages.

In August 1995, claimant obtained employment with Frucon Construction working as a pipefitter. This was the same occupation and was at a comparable wage to that which claimant performed for respondent prior to his injury. After working for two to three weeks claimant was promoted to foreman and continued working for Frucon at a wage comparable to that which he was earning with respondent at the time of the injury. In June 1996, the job with Frucon was concluded and claimant was laid off due to a lack of work. Claimant then sought other employment with other companies.

When dealing with an injury occurring prior to July 1, 1993, the definition of work disability is controlled by the language of K.S.A. 1992 Supp. 44-510e(a) which states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

In proceedings under the Workers Compensation Act the burden of proof shall be on claimant to establish the claimant’s right to an award of compensation by proving the various conditions upon which claimant’s right depends. This proof must be established by a preponderance of the credible evidence. See K.S.A. 1992 Supp. 44-501(a) and K.S.A. 1992 Supp. 44-508(g).

Claimant testified that while working for Frucon he earned a comparable wage while working 60 to 70 hours per week. Claimant acknowledges the loss of his job at Frucon was not in any way related to his physical condition or limitations but instead resulted when the job ended. Claimant further acknowledges originally being hired by Frucon as a pipefitter, which was the job he performed for respondent at the time of the injury. He was promoted shortly thereafter to the job of foreman.

The legislative amendments to K.S.A. 44-510e(a) in 1993 eliminated the presumption of no work disability when dealing with post-injury comparable wages. The Kansas Court of Appeals in Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995), discussed this legislative modification, stating:

“After examining the legislative history of the permanent partial disability provision, it is clear that the presumption of no work disability was designed to help prevent a worker from ‘double dipping’ -- earning substantial post-

injury wages while collecting work disability benefits. The 1993 legislature eliminated the presumption language altogether.”

A case very much on point with the one before the Appeals Board dealing with post-injury wages is Elliff v. Derr Const.. Co., 19 Kan. App. 509, 875 P.2d 983 (1993). In Elliff the Court of Appeals was asked to consider whether the presumption language of K.S.A. 1992 Supp. 44-510e applied to a claimant who, after suffering accidental injury, returned to work in the construction business making a wage higher than that earned on the date of accident. In Elliff, the claimant was also promoted to a supervisory position as foreman. The Court of Appeals found that in returning to work for a company at a higher level position at a greater than comparable wage the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) was not overcome. The Appeals Board agrees and applies that logic to this case.

Claimant contends that the evidence from Mr. Jerry Hardin would be sufficient to overcome the presumption of no work disability. Should the Appeals Board consider the evidence of Mr. Hardin then it would have to take into consideration Mr. Hardin's opinion that claimant could earn only \$300 per week post-injury. This opinion by Mr. Hardin seems ludicrous in light of claimant's actual post-injury earnings. At no time during any pre- or post-injury period of employment for which the Appeals Board has evidence, has claimant earned in the range of \$300 per week for a 40-hour week. Even were the Appeals Board to consider the deposition of Mr. Hardin, his testimony is not sufficient to limit claimant's actual post-injury earning ability to \$300 per week.

The Appeals Board finds, based upon a review of the evidence, that claimant has demonstrated the ability to earn wages comparable to that which he was earning at the time of the injury and as such the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e has not been overcome. Therefore, claimant is limited to the stipulated functional impairment contained in the agreed Award of May 10, 1996.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award on Review and Modification entered by Administrative Law Judge Bryce D. Benedict dated December 30, 1996, should be, and is hereby, reversed and claimant is denied a work disability against the respondent. Pursuant to K.S.A. 1992 Supp. 44-510e claimant is limited to the stipulated functional impairment of 27.5% permanent partial general disability to the body as a whole.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary L. Williams, and against the respondent, Central Mechanical Construction Co., Inc., and its insurance carrier, CNA Insurance Companies, and the Kansas Workers Compensation Fund for 76.14 weeks temporary total disability compensation at the rate of \$299 per week

totalling \$22,765.86, followed by 338.86 weeks permanent partial disability compensation at the rate of \$170.06 per week totaling \$57,626.53 for a 27.5% permanent partial general body disability making a total award of \$80,392.39.

As of May 21, 1997, there is due and owing claimant 76.14 weeks of temporary total disability compensation at the rate of \$299 per week or \$22,765.86, followed by 130.72 weeks of permanent partial general disability compensation at the rate of \$170.06 per week in the sum of \$22,230.24 for a total of \$44,996.10, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$35,396.29 is to be paid for 208.14 weeks at the rate of \$170.06 per week, until fully paid or further order of the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier and the Kansas Workers Compensation Fund to be paid as follows:

Appino & Biggs Reporting Service	\$150.00
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IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
D. Steven Marsh, Wichita, KS
Steven Hornbaker, Junction City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director